

Before the  
**Federal Communications Commission**  
Washington, DC 20554

In the Matter of )  
 )  
Exclusive Service Contracts for Provision of Video ) MB Docket No. 07-  
51  
Services in Multiple Dwelling Units and ) FCC 07-32  
Other Real Estate Developments )

To: The Commission

**Reply Comments of the**  
**Independent MultiFamily Communications Council**  
**(IMCC)**

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## **Reply Comments**

The Independent MultiFamily Communications Council (IMCC) hereby submits these Reply Comments in connection with the Matter of Exclusive Service Contracts for the Provision of Video Services in Multiple Dwelling Units, FCC 07-32, MB Docket No. 07-51.

In our Comments we described the Private Cable Operator (PCO) industry and how PCOs provide competitive communications services in the numerous MDU environments. PCOs are not large in total number of companies, number of subscribers or other indicators of size such as number of employees, revenue, invested resources, et cetera. Nor do PCOs have systems that cover entire cities or regions, let alone national systems. PCOs do not enjoy anything approaching market power or dominance. Yet, PCOs do offer the triple play, using both coaxial cable and fiber, and provide competition to other providers of these services. PCOs are selected to be the provider in many MDU communities because they can provide better service, with more personal attention to residents, with products specifically designed for the unique demographics of a community and often at lower rates.

Our Reply Comments will not focus on the submissions from the 30 or so parties that oppose termination or prohibition of exclusive contacts or the 12 or so parties that support their elimination. Rather, our Reply Comments will focus on the submissions of Verizon, and to a lesser extent AT&T since their Comments basically reiterate the Verizon views.

A. Verizon's submission includes numerous pages proposing and describing a supposedly "narrowly tailored" (page 1), "remedy" (page 2) or "limited" compromise (page 7 and pages 11 through 15). That proposal at best is meaningless and at worst a sham designed to make Verizon appear to

be reasonable when in fact the "remedy" would only damage PCOs and preclude them from competing in the MDU marketplace. No matter how often Verizon describes its scheme it still ends up terminating and prohibiting exclusive service provisions that are essential for the existence of PCOs. To prohibit PCOs and MDUs from using these contract provisions would remove PCOs from the marketplace thereby eliminating the competition they provide. The Verizon proposal is not a narrowly tailored remedy; it is a misleading and self-serving deception. Verizon urges the Commission to act based on the inaccurate view that all types of providers are the same and that the Commission should select which category of provider should succeed and which should fail.

Perhaps Verizon would be interested in a compromise stating that large providers that are "investing massively", as they claim for themselves on page 3, that have market power/dominance or are competing against small providers, as defined by the Commission, should be precluded from utilizing any form of exclusivity.

B. It is gratifying to read on page 1 of Verizon's Comments that, "In many contexts, exclusive commercial contracts may have a procompetitive effect..." Also to read on page 2, "...some (agreements) are even perpetual..." which they oppose. That, on page 3, Verizon agrees that the Commission should adopt a rule that recognizes that there is a period during which "...competition is becoming established" when exclusive contracts are useful. On page 7, Verizon states that when and where there is competition "...there would be no need for the Commission to take action." Also on page 7, Verizon recognizes that when there is competition exclusive contracts "...are likely to result in benefits to consumers..." of broadband services. On page 13 Verizon says that it "...is not suggesting that the Commission regulate building owners or managers." It appears that each of these statements supports the IMCC point-of-view.

IMCC also has stated that exclusive provisions do have a pro-competitive effect, while perpetual contracts and state mandatory access statutes are patently anti-competitive. Also, that periods of time are required for competition to be established. We know that today there is vigorous competition where PCOs provide service and therefore the Commission need not act. Also, that building owners should not be regulated in this regard because they should have the right to enter into contracts which protect their right to manage their private property, particularly when that right benefits residents.

IMCC also asserts that MDU owners, through vigorous negotiations with PCOs, seek the best products and services for MDU communities. Such is evidenced by MDU - PCO contract covenants because they frequently state that the PCO's products and services must be competitive using current technology employed by other providers in the area and that the PCO shall maintain its services to be substantially equivalent to other providers. Therefore, Verizon is correct, the Commission need not act because residents require MDUs and PCOs to self-regulate and provide what residents want.

C. Both Verizon and AT&T seem to view MDU owners and HOAs as so ill informed or so unconcerned about residents that they would act in ways that damage their companies or residents. For instance, at page 1, Verizon asserts that owners would act to "...inhibit deployment of advanced broadband networks..." Also, on pages 1 and 8, that "...MDU owners are unable or unwilling to disclose the existence..." of contracts. Or that, on page 2, MDU owners are actively seeking to sign contracts that are "locking up" their properties to avoid the effects of any Rule that may ensue from this NPRM. Or that MDU owners believe that they are bound long into the future if neither the MDU nor service provider have possession of a Right of Entry (ROE) agreement. On page 8, Verizon says that MDUs would enter into arrangements that, "...threaten to deprive residents...of the benefits of

increased competition..." They also assert that when a developer turns over a new building/community to an MDU owner or HOA all ROE provisions entered into by the developer continue to bind the new owner or HOA, long into the future. Or that somehow the supposed "remedy" offered by Verizon does not regulate building owners. None of the above are accurate.

Those are not the views of IMCC and its member PCOs.

Verizon seems to ignore the fact that building owners have as their paramount objective the leasing of units. That is the most important business objective of owners, because that is the source of income and profits for the owner. The owners also know that to accomplish that objective they must offer the best available amenities and products, including telecommunications, because that is the only way to attract and keep residents who pay the rent that keeps the MDU owner in business and that HOAs need to keep owners pleased with the HOA. To accomplish those objectives MDU owners/HOAs seek out the best providers offering the most beneficial products and services.

Verizon, at page 7, asserts that exclusive contracts exclude competitors from individual properties and that means competition is excluded in entire markets. PCOs recognize that MDU owners negotiate ROEs on a building-by-building basis, not on a city-by-city or region-by-region basis. That is because if alternatives such as PCOs are present, then competition is vigorous on a building-by-building basis and that is far different than an entire region. This is called competition at the curb. Therefore, MDU owners are able to negotiate contracts with all available providers and then sign agreements advantageous to residents of that particular building. Verizon and AT&T control cities and regions and are therefore more likely to control competition in those cities and regions. PCOs only provide service on a building-by-building basis. Even then they do not control competition, but

they do make competition available which forces the other potential providers to negotiate better deals for residents and MDU owners. Also, please recall that negotiating with several providers from the position of strength generated by having a 100 or 1,000 consumers--the building residents--is far more advantageous than the negotiating leverage of a customer in a single-family home.

As to other Verizon assertions, when neither the provider nor the MDU have copies of an ROE, service is on a month-to-month, service at will basis, not service long into the future. Also, in cases when a developer signs a telecommunications contract and then turns over the property to the new MDU owners or an HOA, the owners and the HOA know that many states have statutes that restrict or limit the ability of a developer to bind the hands of the new owner. As examples, such statutes exist in Virginia, Florida, Georgia and California.

Exclusive access provisions have also sped the deployment of high-speed broadband access either years ahead of when that otherwise would have occurred and/or at higher speeds. Also, such provisions allow MDU owners in smaller markets to obtain such services now, not having to wait until Verizon or AT&T build out their larger urban networks.

D. IMCC also states the following:

1. The Commission should first act to eliminate obvious impediments to resident satisfaction, such as laws or practices that retard competition. These include state mandatory access statutes and the use of perpetual contracts. This would also mean the Commission should act to improve pro-competitive influences such as the FCC MDU Inside Wiring Rules.
2. IMCC also believes that exclusive contracts exist because the MDU marketplace finds them efficient and beneficial for residents. Governmental intervention would be another example of supposed

- omniscience that may well produce unintended consequences detrimental to one category of competitors and thereby be a detriment to MDU residents.
3. It should be remembered that MDU residents are able to negotiate through the building owner because they become a negotiating block of hundreds or thousands as opposed to one single-family home consumer.
  4. It is our view that PCOs are a positive influence in the marketplace but their continued existence is dependent upon the Commission recognizing that exclusive contracts are the sine qua non of the ability of PCOs to gain the financing required to build out properties and to produce a rate of return sufficient that lenders will provide additional financial resources to provide service in additional MDU communities.
  5. It also is clear that PCOs have virtually no economies of scale because PCOs can not cross subsidize their business model from an entire city, state or region as can the large providers.
  6. IMCC believes that the same principles and methodologies of regulation used by the Commission in other situations should be applied in this situation. The Commission might be required to regulate one category of providers in one way while at the same time identifying other providers for different treatment.
  7. Exclusive service/access contracts are not unique to the PCO - MDU context. Consider their use in other commercial contexts, such as the following:
    - i. The International Olympics Committee signs one contract with one video distribution company for the exclusive right to distribute that programming.
    - ii. At those same Olympics, American Express has an exclusive agreement to be the "official credit card" for the games.

iii. Apple has signed an exclusive agreement with AT&T for the distribution of the telephone feature of the I-Phone.

iv. It is common practice for LECs/telcos to require that consumers of telephony and Internet services sign contracts which employ Minimum Annual Volume or Revenue Commitments which effectively lock-in customers to extended duration contracts.

v. AT&T, in its Smart Moves program for voice/data/video for MDU residents, requires MDU owners to sign exclusive access agreements.

vi. A restaurant owner is required to sign exclusive agreements with McDonalds to sell its products, not multiple manufacturers of food products even if the consumer desires another company's products. The same applies to owners of automobile retail dealerships even when consumers may desire other types of cars.

vii. Grocery store owners sign exclusive contracts with manufacturers of food products for the most favorable shelf space.

viii. Stadiums and other entertainment venues sign contracts that require the exclusive sales of one type of beverage, Coke not Pepsi or Bud not Coors.

ix. Shopping malls, schools, hospitals and other public venues that offer services such as ATMs or pay telephones sign agreements that such services will be available from a single provider.

x. When a traveler stays at a Marriott hotel he/she can either watch On Command or not watch television because the hotel and the service provider have an exclusive agreement.

Most of these examples share certain characteristics. The agreements make economic sense. They are practical given all the economic forces at work. That is, they are beneficial for the provider, for the middleman seller and for the consumer.

Perhaps this is the same logic that has guided other Commission rulings. In addition to the examples included in the IMCC Comments, the



Commission granted exclusivity to certain communications providers as follows: In Docket No. 03-66, addressing Educational Broadcast Service spectrum, the Commission approved long-term exclusive agreements of that spectrum. Also, the Commission has not intervened in the many situations where cellular carriers require customers to sign an exclusive agreement of long enough duration so that the service provider can recoup invested capital.

E. Verizon repeatedly cites the Competitive Networks Report and Order to suggest that the Commission has already precluded exclusive contracts and that such a principle should be applied to video in MDUs. It should be remembered that the Commission, after deliberate consideration, determined that the Competitive Networks Report and Order should not apply to residential environments and that it is applicable for telephony only, not video. The Media Bureau made it clear that such an expanded application should not be adopted.

F. It is relevant to ask if Verizon and AT&T will be responsive to customers. If so, IMCC assumes that these companies do not espouse and will not act to pursue any of the following:

1. The payment of door fees to any MDU owner for any product that the companies offer.
2. The same with the payment of revenue sharing.
3. The same with the payment of any kind to potential customers.
4. The companies will not reject proposals that would require the companies to provide open-platform rules on the use of wireless airwaves they have acquired from the government.
5. That the companies will not block other technology companies from using the wireless airwaves to provide new products or dictating what can and can not be offered on the Verizon/AT&T wireless networks.

6. That the companies will never tell an MDU owner or HOA that it must take all products offered or that a certain product, for instance telephony, would not be made available unless all products are taken.

G. It is also interesting to note that in the Comments of Verizon and AT&T they emphasize their intention, plan, hope or whatever to provide their products and services at rates far below what other providers charge to customers. Perhaps it is instructive that those companies were recently granted, by the California Public Utilities Commission, great freedom in pricing their products. In the words of an AT&T representative, they were intent on making sure "customers reap the full benefits of competition." Then, both companies, in tandem, raised the rates for most products. For instance, telephone caller ID went from \$6.17 per month to \$9.00 and call waiting went up 55%. IMCC assumes that this real world experience will not apply in the video context for MDU residents.

H. It might also be prudent for the Commission to consider the recommendations of the National Association of Telecommunications Officers (NATAO). In Reply Comments, they essentially say that the issues raised in this proceeding are not simple and have many, far reaching ramifications. They also state that the Commission has not gathered sufficient data and information to make an educated and well-reasoned decision on the issues involved. Assertions, arguments and surmises based on anecdotal stories, without any empirically gathered data, should not be adequate for the Commission to make rulings which effect so many companies, individuals and the future of telecommunications in the homes of one-third of the nation's population.

## **Closing**

IMCC closes its Reply Comments by quoting AT&T's Comments at page 7. They state, "...exclusive contracts can provide significant consumer benefits (such as encouraging investments in new products and services and improved customer service) in *competitive markets*..." PCOs believe that is the very point. Where PCOs exist there is competition. PCO existence is dependent on adequate financing. That is only available if PCOs are allowed to utilize exclusive contracts.

In an effort to level the playing field between franchised cable companies and the new telephone company offerings, the Commission should not preclude the positive influence of PCOs. Small companies without market power/dominance should be encouraged by the Commission, not accidentally be made extinct. If the Commission pursues this rulemaking we urge it to fashion a rule which recognizes this reality and not terminate the positive influence provided by PCOs.

Respectfully submitted,

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